Supreme Court, U.S.
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No. 97-1999

In The

Supreme Court of the United States

October Term, 1997

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

vs.

M.V. DSR ATLANTIC, her engines, tackle, machinery, etc., in rem; CHO YANG SHIPPING COMPANY, LTD. a corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents' opposition misses the point. The issue is whether a bill of lading clause that has the effect of relieving the *ship* of all liability can be enforced without violating § 1303(8) of COGSA. The "proposed legislation" discussed by respondents *retains in almost exactly the same language the principle at issue here*: Congress' mandate that a provision in a bill of lading relieving *a carrier or a ship* from liability is unenforceable. The proposed legislation does not in any way change cargo's substantive right to a maritime lien on the ship for damage to cargo. Moreover the "proposed legislation" is just that. While it would outlaw a foreign forum and jurisdiction clause such as the one involved in this case, no number has been assigned to any bill and already there is opposition to it. More importantly, the political events of September 1998, will certainly consume Congress' attention for the foreseeable future. Further, the facts that 1998 is an election year and that Congress has a history of years of delay in passing the first version of COGSA in 1936, render highly speculative predictions of prompt consideration of the proposed legislation anytime soon, much less its passage and signing by the President.

Respondents' opposition in fact reinforces the need for this Court's review of the Ninth Circuit's decision. Respondents and the Ninth Circuit propose a fundamental change in the law of maritime liens for cargo damage: A maritime lien is no longer a substantive right. It is "merely" a procedural device that can be lost by an artfully drawn bill of lading clause. Such a fundamental change calls for review by this Court, not only because it conflicts with the law of this Court, and of other circuit courts, but also because it has caused and will continue to cause confusion in the district courts.

PROPOSED LEGISLATION

The proposed legislation has not even been introduced to Congress. It is based on the proposed amendments to COGSA adopted by the MLA in 1996. Section 8(a) of the proposal is virtually identical to current COGSA § 1303(8) and retains the ship as a distinct legal entity:

> Any clause, covenant, or agreement in a contract of carriage relieving a carrier **or a ship** from liability for

> loss or damage to . . . goods . . . , or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect . . .

See MLA doc. no. 724 at 51. (Emphasis added).

The "final" version maintains the separate and distinct liability of carrier and ship:

> Any provision in a contract of carriage relieving a carrier **or a ship** from liability for loss of, or damage to, . . . goods . . . , or reducing such liability otherwise than as provided in the Act, is unenforceable as contrary to public policy.

See Sturley August 10, 1998 Memo Re: COGSA Bill — Working Draft of June 19, 1998 (App. A at 2a) (Emphasis added). While it is correct that the proposed legislation would completely outlaw a foreign forum and jurisdiction clause like the one enforced by the Ninth Circuit, cargo's right to a maritime lien against the ship remains unchanged. *See* MLA doc. no. 724 at 51, § 8(b).

As the Court well knows, the legislative process is inherently unpredictable. The proposed amendments have generated opposition. As noted in the same news article quoted by respondents, "The compromise plan, however, has a major detractor — the American Waterways Operators, representing the nation's inland and coastal barge and towing industry." Tim Sansbury, *Senator Vows to Change Liability Law Covering Cargo Damaged or Lost at Sea,* The Journal of Commerce, Apr. 23, 1998. In May, further opposition surfaced in an article headlined: *"Europe shipping interests blast proposed changes to US cargo liability rules."* Aviva Freudmann, The Journal of Commerce, May 4, 1998, at 1.

The political process is even more uncertain when it comes to legislation affecting international trade. The difficulty and history of delay inherent in the process of enacting such legislation are well-described by respondent's counsel in his 1996 article, Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 Hous. J. Int'l L. 609, 610-615 (1996):

> There are many possible explanations for this unfortunate situation, but all of them essentially reduce to one simple fact: Unless those affected by the rules in question can agree on the course of action that should be followed, Congress is unwilling to act in a complex and technical field where it has little expertise and sees no opportunity for political gain. This is hardly a new problem. Seventy years ago, the same kind of inertia was a principal explanation for Congress' failure to ratify the Hague rules promptly.

Id. at 613-614. If history is any guide, it could be years before Congress acts on the proposed legislation and likely far longer than it would take for the Court to hear and decide this case.

As acknowledged by counsel for respondents in his August memo to the MLA committee (App. A at 1a), the bill has not been introduced for "political reasons." Further changes are likely to be made to satisfy concerns of the railroads, American Waterways Operators or other interests. Finally, the MLA's Summer 1998 President's Newsletter dated August 15, 1998 states at page 4 regarding prospect for passage, "Given the exceptionally short session of the present Congress, it is expected that the Proposal will not be acted upon until after the new Congress convenes in 1999." As of September 1998, Congress has become engulfed with issues of far greater concern.

THE NINTH CIRCUIT'S DECISION EXTINGUISHING SUBSTANTIVE STATUTORY RIGHTS SHOULD BE REVIEWED

Even as the Court considers this petition, an additional district court has noted the conflict between the Ninth Circuit's decision and the plain language of § 1303(8) of COGSA. In *Union Steel America Co. v. M/V Sanko Spruce, et al.*, 1998 WL 416871, at 13 (D.N.J. July 20, 1998), __ F. Supp. 2d __, the district court addressed the scope of *Sky Reefer* with respect to requiring a cargo plaintiff with a maritime lien for cargo damage to litigate in Korea where all agree no *in rem* action against a vessel is recognized. It noted the conflict between the Ninth Circuit in this case and the district court in *International Marine Underwriters CU v. M/V Kasif Kalkavan*, 989 F. Supp. 498 (S.D.N.Y. 1998):

> Section 3(8) of COGSA forbids any clause in a contract of carriage relieving "the carrier or the ship from liability." One court has recognized that a "plaintiff's inability under Korean law to bring an *in rem* action against the vessel, would appear to deprive plaintiff of one of the substantive rights expressly guaranteed by § 3(8) (citing *Kasif Kalkavan*)." The Ninth Circuit has reached the opposite conclusion, reasoning that an *in rem* action is merely a means of enforcing COGSA liability (citing the *DSR Atlantic* decision).

These decisions cannot be harmonized. Undoubtedly, more conflicting and confusing rulings will follow as long as the Ninth Circuit's decision in *DSR Atlantic* stands.

This Court has consistently recognized *in rem* proceedings as the *only* way to enforce a maritime lien. In *California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464, 1470 (1998) the Court stated:

> That jurisdiction encompasses "maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien." (cit. om.).

Respondents and the *DSR Atlantic* decision would extinguish those substantive rights by confusing procedures for enforcing a substantive right with the right itself.

CONCLUSION

There is no legitimate reason for this Court to delay hearing this case because of proposed legislation which has not even been introduced to Congress. The proposed legislation does not change existing law maintaining the ship as a separate legal entity that is liable for loss or damage to cargo. While it would outlaw the forum clause enforced by the Ninth Circuit, it does not change the issue before this court: Whether or not a bill of lading clause can relieve the **ship** from liability for loss or damage to cargo. Finally, for the reasons discussed above, Congress is not likely to turn its attention to this kind of legislation in the near future. The reality is that it could be years before Congress acts on whatever legislation is finally put before it.

The Ninth Circuit and respondents confuse a substantive right to a maritime lien with the mechanism to enforce it. This confusion conflicts with clear statutory language and has led to conflict and more confusion in the district courts. It is axiomatic that a right with no remedy is no right at all. A right does not become a "mere procedure" because procedures are in place to protect and enforce it. By their nature, rights are abstract concepts — "legal fictions" — that require legal procedures for protection and enforcement. Reducing that right to a "mere procedure" that can be avoided by a bill of lading clause extinguishes it. Such a fundamental change in maritime lien law should emanate from Congress and certainly calls for review by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — STURLEY AUGUST 10 MEMO

TO: Lloyd Ator

CC: William J. Augello
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George F. Chandler
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Chester D. Hooper
Marilyn L. Lytle
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FROM: Michael F. Sturley

DATE: August 10, 1998

RE: COGSA Bill — Working Draft of June 19, 1998

Although I understand that the COGSA Bill is not yet ready to be introduced (for political reasons), the draft itself is virtually ready — at least in terms of giving effect to the substance of the original MLA proposal. My comments at this point involve primarily typographical errors and stylistic suggestions.

I understand that some additional changes will need to be made that will change the substance of the original MLA proposal. For example, I understand that there is agreed language to be added that will satisfy the railroads' concerns. Perhaps there will also be language added for the benefit of the American Waterways Operators (AWO) or other interests. I do not address any of those concerns here.

* * * * *

EXCERPT FROM COGSA '98 6/19/98 REVISION

[Commencing at page 15]

(B) the carrier was not entitled to qualify the statement under paragraph (1); or

(C) a person relying on the statement proves that the carrier did not act in good faith when issuing the contract of carriage.

(h) RELIEF-FROM-LIABILITY CLAUSES. —

(1) IN GENERAL. — Any provision in a contract of carriage relieving a carrier or ship from liability for loss of, for damage to, or in connection with goods from negligence, fault, or failure in the duties and obligations under this Act, or reducing such liability otherwise than as provided in this Act, is unenforceable as contrary to public policy.

(2) INSURANCE. — A benefit-of-insurance clause in favor of a carrier, or similar clause, shall be considered, for purposes of paragraph (1), to be a provision relieving a carrier from liability.

(i) FOREIGN FORUM PROVISION. —

(1) APPLICATION. — This subsection applies to a contract of carriage or other agreement that was entered into before a claim that is subject to this Act arose under that contract or agreement.

(2) IN GENERAL. — A provision in a contract of carriage or other agreement to which this subsection applies that specifies a foreign forum for litigation . . .

* * *